United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-6147

JAN 11 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

VARIOUS ARTICLES OF OBSCENE MERCHANDISE, SCHEDULE NO. 1350,

Defendants in Rem,

FRED CHERRY,

Claimant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS
FILED
JAN
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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POINT I

THERE EXISTS A CONTROVERSY REGARDING THE QUESTION OF WHETHER OR NOT THE CUSTOMS BUREAU ALLOWED THE IMPORTATION OF THE FILM "SENSATIONS", AND THE COURT BELOW SHOULD HAVE ALLOWED DISCOVERY IN ORDER THAT THE IMPORTER BE GIVEN AN OPPORTUNITY TO IMPEACH THE REPRESENTATION MADE TO THE COURT BELOW BY THE UNITED STATES ATTORNEY.

The importer contends that the Customs Bureau allowed the film "Sensations" to be imported into the United States. The U.S. Attorney has made a representation to the court below to the effect that the Customs Bureau did not "approve" the importation of that film. Now, even if the U.S. Attorney had filed an affidavit, sworn to by a Customs Bureau official, to the effect that the film "Sensations" had been smuggled into the country, the importer should still have been granted the right to conduct discovery proceedings in order to impeach the affiant. As stated in Volume 8 of Federal Practice and Procedure by Wright & Miller, Section # 2015, page 113:

"Although the case law in point is extremely scanty, there has recently been a significant amount of discussion by the writers about the circumstances under which a party may discover material useful for impeachment. The problem has two aspects: a party may wish to acquire information with which he can impeach the witnesses for his opponent or he may wish to learn whether his opponent has information with which the party's own witnesses are liable to be impeached.

The first aspect of the problem is easy. Discovery is commonly allowed in which the discovering party seeks information with which to impeach witnesses for the opposition." (citations added)

If the law were such that a party could deny discovery merely by making representations as to disputed facts, then discovery, as a practical matter, would be abolished.

Furthermore, even if the court accepts the representations made by the U.S. Attorney to the effect that the Customs Bureau did not "approve" the importation of the film "Sensations", it still is not denied that the film actually entered the country, nor is it contended that the film was smuggled into the country. So, the question remains. How did the film get into the country?

In a situation of this sort, it might be helpful to look at the opinion of the Supreme Court in United States v. Nixon, 418 U.S. 683, 709, which states: "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To insure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."

In conclusion on this point, if the President of the United States is not allowed to thwart discovery by making

representations, then neither should any other federal official be allowed to do so.

POINT II

APPELLANT SHOULD HAVE BEEN GRANTED AN OPPORTUNITY TO PRESENT EVIDENCE OF THE LOCAL COMMUNITY STANDARD OF OBSCENITY

As the imported pointed out in his first brief, pages 7-8, he was denied all opportunity to present evidence of the local community standard. In fact, the court below held that any such evidence would be irrelevant (page 7 of first brief). The importer also pointed out that even if he had been allowed to introduce evidence by means of expert witnesses, he would still lose, because the cost of an expert witness would be many times the cost ($8.00) of the magazine in question (pages 7-8 of first brief). Now, the U.S. Attorney suggests, in a footnote on page 5 of his brief, that an expert witness be appointed by the court and that the cost of said expert witness be shared by the parties. This would still not be a reasonable solution, because even a fair portion of the expert witness fee would still be many times the cost of the magazine in question.

POINT III

NON-OBSCENE MATERIAL INCLUDED IN A PACKAGE WITH MATERIAL FOUND TO BE OBSCENE, IS NOT SUBJECT TO FORFEITURE UNDER 19 U.S.C. 1305

The U.S. Attorney, on pages 6 and 7 of his brief, refers to

"the order form". Actually there were two order forms. The U.S. Attorney, at the trial, speaks of order blanks (App, 14a, 61a). The U.S. Attorney's brief, at page 7, also states: "In addition, attached to the order form was an illustration of the magazines listed in the order form." This is also incorrect. The order forms were not attached to the advertising brochure at the time of the trial. The U.S. Attorney, at the trial, said that the order forms were "in the envelope with the material which is now determined to be obscene" (App, 61a). There is nothing in the record to suggest that the order forms were physically attached to the advertising brochure. These may seem like trivial matters, but the point is that the order forms were physically not part of the advertising brochure, and that a precedent may be established which will harm the importer in the future.

Next, the U.S. Attorney, on page 7 of his brief, states: "/T/he claimant has conceded that the illustration of the magazines that could be ordered via the order form was obscene". This is also incorrect. The importer has conceded that the advertising brochure is obscene. This is not the same thing as conceding that the illustration of every magazine illustrated therein is obscene. An item may be obscene and still contain non-obscene portions. People v. Heller, 352 N.Y.S.2d 601, 617-618. Furthermore, an advertising brochure may be obscene, while, at the same time, the articles advertised therein are not obscene. Hamling v. United States, 418 U.S. 87, 101. Therefore it has not been conceded, nor established, that every magazine offered for sale in the advertising brochure is obscene.

The government, in attempting to confiscate non-obscene

material, is attempting to do something equivalent to confiscating the entire contents of a bookstore on the grounds that some of the books therein are obscene.

The U.S. Attorney, on page 7 of his brief, states:

"While it appears that in United States v. 18 Packages of Magazines, 227 F. Supp. 198 (N.D. Calif. 1963) the Court took a somewhat more restrictive view of 19 U.S.C. #1305, that case can be distinguished in that it was not alleged nor shown at trial that the obscene portion of the package was enclosed with the knowledge or consent of the importer. 227 F. Supp. at 202."

Again incorrect. The opinion (227 F. Supp. at 202) merely states that it was not alleged in the libel (complaint) that the obscene portions of the packages were enclosed with the knowledge or consent of the importer. Neither was that alleged in the complaint in the present case. On the other hand, it most certainly was established, in that other case from California, that the obscene portions of the packages were enclosed with the knowledge and consent of the importer. The same case is treated in another opinion, which states: "The undisputed facts show that the magazines which are the subject of this proceeding were purchased abroad by claimant and shipped to this country." (footnote 1) "Aspects of this case were treated by Judge Sweigert in United States v. 18 Packages, 227 F. Supp. 198 (N.D. Calif., 1963). That decision narrowed the applicability of the statute and resulted in the release of a substantial number of magazines originally seized." United States v. 18 Packages of Magazines, 238 F. Supp. 846, 847. In contrast, the importer in the present case states, in paragraph # 10 of the answer (not reproduced in

the Appendix), that he had never seen the merchandise in question, nor identical merchandise. This statement was made, subject to the penalties provided by 18 U.S.C. 1001 for making false statements to a federal agency. 18 U.S.C. 1001 applies to false statements made to district courts. United States v. Stephens, 315 F. Supp. 1008. Therefore, the statement should be regarded as true. Which means that the importer in the present case stands in a better position than the importer involved in United States v. 18 Packages of Magazines, 227 F. Supp. 198.

POINT IV

THIS COURT SHOULD DETERMINE FOR ITSELF WHETHER OR NOT THE MATERIAL FOUND TO BE OBSCENE BY THE COURT BELOW IS, IN FACT, OBSCENE

The U.S. Attorney, on page 7 of his brief, states that: "/T/he Miller case /Miller v. California, 413 U.S. 15/7 articulated the community standard test as vesting in the jury the duty to determine that standard."

There seems to be some ambiguity in the Miller opinion which has been clarified by the Supreme Court's opinion in Jenkins v. Georgia, 418 U.S. 153. Volume 41 of the Supreme Court Reporter, Lawyer's Edition, Second Series, has an annotation starting at page 1257 on the "Concept of Obscenity". Section 21 of that annotation, pages 1290-1291, explains this point. On page 1290 that annotation says: "Notwithstanding earlier diversity of views expressed by individual members of the United States Supreme Court on the question, it is now settled that the Supreme Court

will make an independent determination of obscenity, irrespective of the findings below." (emphasis supplied)

The annotation goes on to explain (page 1291) that part of the plurality opinion of the Supreme Court in Jacobellis v. Ohio, 378 U.S. 184, to the effect that the viewing court must make an independent determination of obscenity, is still good law. Of course that part of the plurality opinion in Jacobellis which refers to a national standard of obscenity, was overruled by Miller v. California, 413 U.S. 15. The case on which the U.S. Attorney relies on in his brief, namely United States v. One Reel of 35 MM Color Motion Pic. Etc., 491 F.2d 956, was decided after Miller v. California, 413 U.S. 15, and before Jenkins v. Georgia, 418 U.S. 153. On the other hand, the case on which the importer relies, namely United States v. 35 MM Motion Picture Film, Etc, specifically cites Jacobellis, at 432 F.2d 709-711.

San Tursi, Puerto Rico
January 10, 1977
Respectfully Submitted

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